No. 146.

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Supreme Court of the United States.

OCTOBER TERM, 1898.

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THE REMINGTON PAPER CO.,
PLAINTIFF IN ERROR,

v.

JOHN W. WATSON AND OTHERS,
DEFENDANTS IN ERROR.

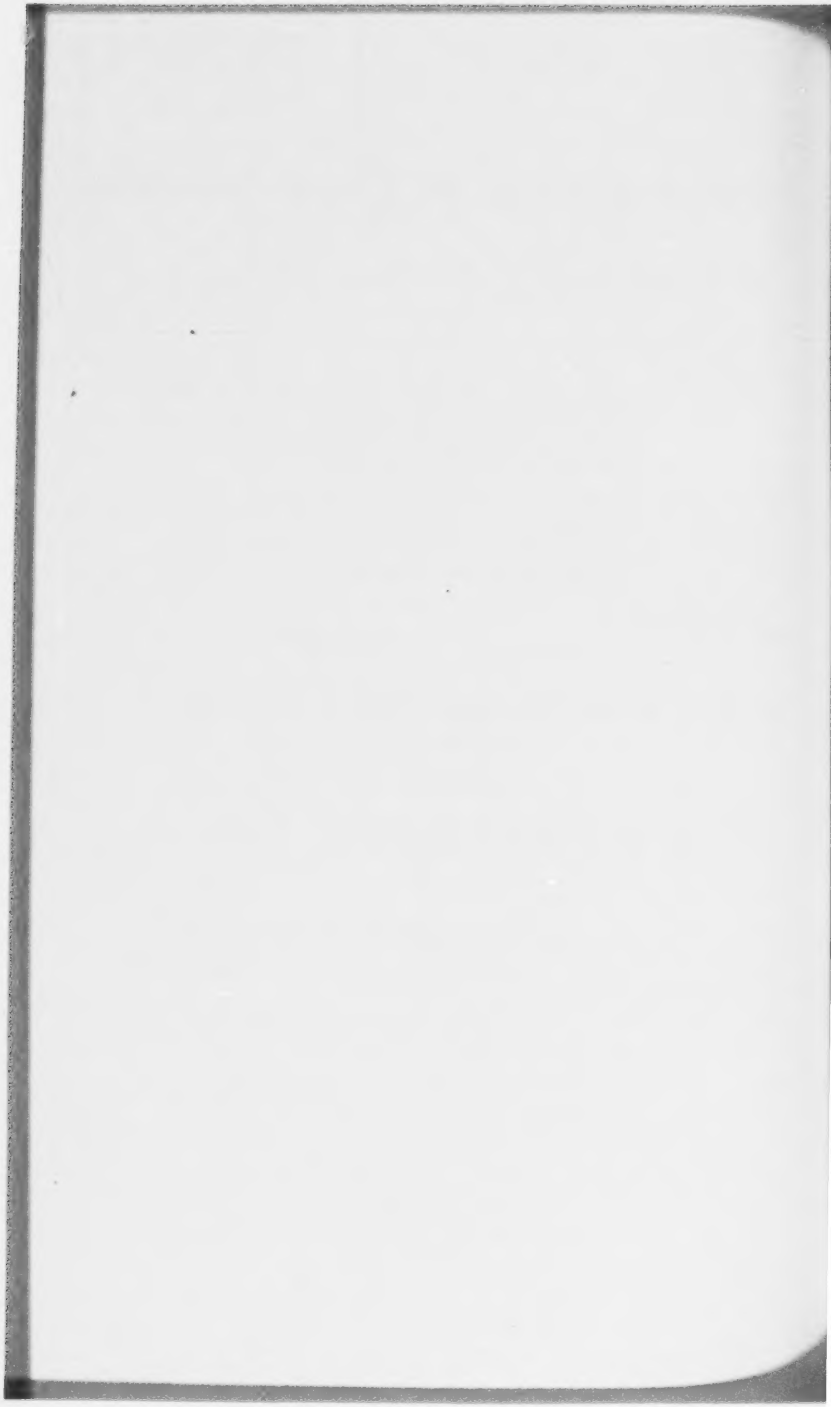
No. 146.

In Error to the Supreme Court of the State of Louisiana.

BRIEF FOR DEFENDANTS IN ERROR.

ALEXANDER PORTER MORSE,
Of Counsel.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1899.



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Brief for Defendants in Error.

STATEMENT.

On the 17*th day of May, A. D.* 1893, John W. Watson, one of the defendants in error, was, by order of the Civil District Court of the Parish of Orleans (a court of general jurisdiction), appointed receiver of the "Louisiana Printing and Publishing Company, Limited," a corporation organized under the laws of the State of Louisiana, and particularly under the act of 1888 providing for the organization of corporations of limited liability. (Record, 127, 133-137.) This appointment of receiver was made

upon the petition of creditors in whose suit the State, by her Attorney General, intervened and prayed for the appointment of a receiver and ultimately for the forfeiture of the charter of the corporation.* (Record, pp. 126–132.)

The allegations upon which the Civil District Court acted in appointing Watson receiver were that the officers of the corporation had abandoned their corporate functions and duties and had left the corporation's property to be seized by creditors, etc. (Record, pp. 126–7.)

Upon these allegations the court appointed Watson, receiver, who subscribed the oath of office, and entered on his duties May 18, 1893. (Record, pp. 127, 138.)

On the 29th of May, 1893,—six days after the appointment by the Civil District Court of Watson, receiver,—the plaintiff in error, a non-resident corporation, alleging that it was a creditor of the "Louisiana Printing and Publishing Company, Limited," filed attachment proceedings in the *United States Circuit Court for the Eastern District of Louisiana*, making the Louisiana Printing and Publishing Co. defendant, alleging fraudulent disposition of property, etc., etc. (Record, pp. 115–117.) A writ of sequestration was issued the same day. (Record, p. 121, 122.)

Upon motion to quash attachment and sequestration in the United States Circuit Court, by Watson, receiver, the latter court, *on the 6th of June*, 1893, ordered release of the property theretofore seized by the marshal under the aforesaid proceedings. (Record, pp. 123, 124, 138, 139.) The order was in terms that "*marshal restore the property seized in this cause under the writs of attachment and sequestration*

*Citation was made upon the president of the failing corporation. (Record, p. 128.) No stockholder appeared in opposition. (Record, pp. 98, 99.)

to John W. Watson, receiver, unless within five days the plaintiff applies for and ultimately receives authority from the Civil District Court which appointed Watson, or from the appellate court to hold same under said writs." (Record, pp. 139, 140.)

On the 9th June, 1893,—three days after the order for release of attachment of the marshal by the Circuit Court of the United States,—petitioner below (plaintiff in error here) filed in the Civil District Court of the Parish of Orleans petition and action of nullity and for damages against Watson, receiver, Pope, petitioning creditor, and The Louisiana Printing and Publishing Company.* The petition alleged that the appointment of Watson as receiver was null; that Watson and the president of the failing corporation and others fraudulently conspired to hinder and delay petitioner in the prosecution of its rights under the laws and Constitution of the United States of America, and that Watson, and Pope (petitioning creditor in the original suit) were liable to it in damages in the sum of thirty-eight hundred and sixty-three dollars and fifty-five cents, amount of its claim. (Record, pp. 1–4.) Amended petitions were filed July 1, 1893, and May 24, 1894 (Record, pp. 6 and 10), in the latter of which it was averred, somewhat more particularly, that all the proceedings in the Civil District Court were in violation of the fifth and fourteenth amendments of the Constitution of the United States. (Record, pp. 10–11.) Upon hearing, the Civil District Court rendered judgment in favor of Watson as receiver, and dismissed the suit for damages. (Record, pp. 99, 100, 103–4.) From that judgment peti-

* Action of Nullity: Garland's Revised Code of Practice of Louisiana, bottom of page 476 *et seq.*

tioner below (plaintiff in error here) sued out writ of error to the Supreme Court of Louisiana, which affirmed the judgment of the Civil District Court. (Record, pp. 173–177.) *No appeal was taken from the judgment in the original suit dated May* 19, 1893, *in which Watson was appointed receiver.* (Record, p. 100.)

Points of Law or Fact.

Upon the facts disclosed by the record, it is submitted that this Court cannot exercise supervisory power over the judgment in this cause rendered by the Supreme Court of the State of Louisiana. And the writ of error should be dismissed for want of jurisdiction for reasons hereinafter stated.

First. The record presents no Federal question. (Oxley Stave Co. *v.* Butler Co., 166 U. S. 648; Fowler *v.* Lamson, 164 U. S. 252; C. N. & W. R'y *v.* Chicago, 164 U. S. 454.)

"A real, and not a fictitious Federal question is essential to the jurisdiction of this court over the judgments of State courts."

Hamblin *v.* West. Ld. Co., 147 U. S. 530.
St. Louis &c. Ry. Co. *v.* Missouri, 156 U. S. 483.

"The bare averment of a Federal question is not, in all cases, sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79.

Second. As no appeal or writ of error has been taken from the order (judgment) of the Civil District Court of Louisiana of *May* 17, 1893, appointing Watson receiver of the failing corporation, the matter is *res judicata* and conclusive;

Third. The question of the validity of the attachment and sequestration in the Circuit Court of the United States is settled by the order of that court adverse to the plaintiff in error, in a proceeding between plaintiff in error and Watson, one of the defendants in error, involving the seizure thereunder; and if so, said decision is *res judicata* upon the question of said attachment and sequestration. But if said order of the Circuit Court of the United States is not *res judicata* upon the validity *vel non* of said attachment and sequestration, the question is still pending in that court between plaintiff in error and Watson, receiver, and others, defendants in error.

I.

As to Jurisdiction.

No Federal question was presented in the Civil District Court or in the Supreme Court of Louisiana, and consequently this Court will not entertain jurisdiction to review the judgment of the latter court.

Neither the allegations of petitioner below (plaintiff in error here) in the original or amended petitions nor in the assignments of error set out any facts which constitute a right, title, or privilege under the several clauses of the fifth and fourteenth amendments.

The controversy initiated by petitioner (plaintiff in error here) was instituted and prosecuted on the theory that

the procedure of the courts of Louisiana was irregular and informal, and null and void under the laws of the State of Louisiana.

However the proceeding of the petitioner (plaintiff in error here) before the courts of Louisiana may be regarded,—whether as primarily an ancillary proceeding to that of the same petitioner in the United States Circuit Court against the corporation as its debtor, and secondarily, an action to annul the order appointing the receiver for certain alleged informalities in the proceedings, coupled with a demand for damages against the receiver and the petitioning creditor, —its essential character is not altered. It was an attempt on the part of a third-party creditor to appear in a judicial litigation, not for the purpose of asserting a right, title, or interest in and to the *res in custodia legis* for the common benefit of all creditors, but for the purpose of avoiding the processes of law which were invoked for the common benefit of all creditors, and with this view to substitute by preference an alleged right or claim of said third party. The informalities, if any, in the Civil District Court, denounced by plaintiff in error, did not oust or render void the jurisdiction of that court.

There is a wide difference between want of jurisdiction in a court and error by a court.

The failing corporation was properly cited to answer the petition of a creditor for the appointment of a receiver, and it matters not if no citation was asked for in that petition, for citation issued and answer was filed. (Record, p. 128.)

The informalities complained of by petitioner (plaintiff in error below) raised questions of local law or practice in respect of which the judgment of the State court was final.

Oxley Stave Co. *v.* Butler Co., 166 U. S., p. 652.

The Civil District Court for the Parish of Orleans is a court of general jurisdiction, and rightly exercised its jurisdiction over the subject-matter and the parties in the original suit, in which Watson was appointed Receiver.

Constitution of the State of Louisiana of 1879, Article 130.

In the matter of the Louisiana Savings Bank, 35 La. Ann., p. 179.

Raymond *v.* Palmer, 35 La. Ann., p. 277.

The proceedings in the courts of Louisiana was "due process of law" according to the constitution and laws of the State of Louisiana, because the Supreme Court of that State has so decided. If it were not "due process of law" under the State constitution and laws, this Court will not exercise its revisory power, unless it be also no due process of law under the Constitution of the United States. What in all cases shall constitute "due process of law," and the reverse, within meaning of the constitutional amendments, it is impossible for any court to define abstractedly and *a priori* with legal precision. The varying relations of business, of society, and of government are constantly introducing new conjunctures, which, as they cannot be anticipated by the courts, must be determined as they arise under the provisions of the Constitution.

So sensibly has this been felt by this Court that it has always and uniformly declined to furnish an abstract and comprehensive definition of "due process of law" in all cases.

Davidson *v.* New Orleans, 96 U. S. 97.

Though certain general propositions have been declared by the Court relative to this subject, each case, as it has come before this Court, has been ruled with reference to its own peculiar facts and circumstances in order to ascertain its harmony or the reverse with the true construction of the Constitution.

Dent *v.* West Virginia, 129 U. S. 123; Missouri Pacific R'y *v.* Humes, 115 *Id.* 519; *Ex parte* Wall., 167 *Id.* 289; Hurtado *v.* California, 110 *Id.* 535; Hagar *v.* Reclamation Dist., 111 *Id.* 708; Hovey *v.* Elliott, 167 U. S. 409.

The questions made by the errors assigned are in language and effect too general and indefinite to come within the provisions of the constitutional amendments, or the decisions of this court.

Crowell *v.* Randall, 10 Peters, 368.

Oxley Stave Co. *v.* Butler Co., 166 U. S. 656.

II.

It is perfectly apparent that the petition and amendments thereto by petitioner (plaintiff in error here) proceeded upon the ground that the several steps in the original suit appointing a receiver were repugnant to the State laws, and, being so repugnant, the petitioner was entitled to a specific judgment, for which he prayed accordingly. But whether the proceedings in the State courts were repugnant to State law or in conformity thereto, this Court has no jurisdiction to determine. And, as the petition prayed for relief, it amounted, in substance, to a general appearance.

It is true that the petition contained allegations of collusion and fraud—badly enough alleged as often determined by this Court—because no facts or circumstances amounting to such collusion or fraud are in such petition alleged. But that collusion or fraud passed upon by the highest court of the State, and not pretended as evasions of the supreme law of the land, were open to correction on error to this Court, no one, it is supposed, will be found to affirm.

III.

Second. As no appeal or writ of error has been taken in the original suit from the order of the Civil District Court for the Parish of Orleans of *May* 17, 1893, appointing Watson receiver of the failing corporation, the matter is *res judicata* and conclusive.

IV.

Third. The validity of the attachment and sequestration in the Circuit Court of the United States is settled by the order of that court adverse to the plaintiff in error in a proceeding between plaintiff in error and Watson, one of the defendants in error, involving the seizure thereunder; and, if so, said decision is now *res judicata* upon the question of said attachment and sequestration. But if said order of the Circuit Court of the United States is not *res judicata* upon the validity *vel non* of said attach-

ment and sequestration, the question is still pending between plaintiff in error and Watson, receiver, and others, defendants in error.*

V.

On the Merits.

It is alleged in argument that, under the law of Louisiana, a receiver does not represent creditors nor defend actions as a syndic or executor or administrator may do; that he is no officer of the court in whom title is vested. (Brief for plaintiff in error, p. 27.) But the law as to this seems settled by the courts in Louisiana; and no error appears in this record either in the appointment or in the acts of the court in respect of the appointment of the receiver Watson.

Where the stockholders of a corporation, in whom is vested by charter the right to liquidate its affairs, consent to appointment of a receiver by the court, they abdicate

* "The order of the federal court having first released and discharged the seizure and required the marshal to surrender the property to the receiver, and the creditor having thereafter instituted an action in the State court to annul the receiver's appointment and for damages sustained thereby, the two suits are totally distinct and separate, the creditor having failed to exercise the option given it by the federal court to apply to the State court within five days for the retention of the seizure. Not having availed itself of that option and not having used any effort to enforce or protect its vendor's lien upon the property in the possession of the receiver, the creditor is without any well-grounded claim for damages against the receiver personally, who acted under the authority of orders of a court possessed of competent jurisdiction; and the creditor's claim for damages being without foundation, no occasion is presented for the court to examine and pass upon the validity of the receiver's appointment."

Syllabus of decision of the Supreme Court of Louisiana in Remington Paper Co. *v.* Watson. (49 La. An., p. 1296.)

their right in favor of the court's appointee, and no creditor has a right to complain.

In re Louisiana Savings Bank, 35 La. Ann. 200.

Where the officers of a corporation abandon their positions, and expose the corporate assets to loss by delapidation or theft, the courts of Louisiana will appoint a receiver.

Baker *v.* Portable R.R. Co., 34 La. Ann. 754;
Stark *v.* Burke, 5 La. Ann. 740;
N. O. Gaslight Co. *v.* Bennett, 6 La. Ann. 456;
Brown *v.* Union, 3 La. Ann. 182;
Fallet *v.* Field, 30 La. Ann. 162.

It appears from the record that every officer and every director of the failing corporation abandoned their respective positions and functions. (Record, pp. 57, 58.) And such fact clearly warranted the action of the Civil District Court for the Parish of Orleans in appointing the receiver. The plaintiff in error is an ordinary creditor who seeks a preference by attachment. There is neither equity or justice in its demand. Such creditor demands that it be allowed to absorb all the assets of the company to satisfy its single claim.

Alleged errors of a State court which involve questions either of fact or of State, not Federal law, are not reviewable in the United States Supreme Court on writ of error.

Kennard *v.* Louisiana, 92 U. S. 480.
Quimby *v.* Boyd, 128 U. S. 488.

"The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties litigant."

Antoni *v.* Greenhow, 107 U. S. 769.

York *v.* Texas, 137 U. S. 21.

However it may have been at an earlier period, the jurisprudence of the State of Louisiana in respect to the power of the courts to appoint receivers is now well settled.

"It is claimed that the judgment of July 1st is absolutely null, by reason of the want of jurisdiction of courts of this State to appoint receivers or commissioners for the liquidation of corporations.

"When, in the case of Baker *v.* Portable Company, 34 An. 754, we laid down the general rule that 'courts have no jurisdiction to appoint receivers for corporations in absence of express statutory authority,' the word *jurisdiction* was, perhaps, inaccurately used.

"The exception which we maintained in that case was not one to the jurisdiction of the court, but one of no cause of action.

"Certainly we did not mean to impute to the courts such defect of jurisdiction *ratione materiæ* as could not be supplied by consent and as would render their judgments in the premises absolute nullities. We rather meant to lay down a rule of judicial action than a canon of jurisdiction—a limitation of judicial right rather than of judicial power.

"The rule is founded upon the respect and protection due to the rights of a corporation in common with those of other persons. As we said in that case: 'A corporation is a person, whose possession and control of its property and affairs must be respected like the similar rights of individual persons. They cannot be interfered with in preliminary proceedings and in advance of judg-

ment, except in cases specially provided by law and on strict compliance with the requirements thereof.'

"The immunity from such interference is evidently personal, and capable of being waived by proper and valid consent in the case of corporations as of individuals.

"The principles recognized in the following cases, *in pari materia*, are fully applicable: Frazier *v.* Wilcox, 4 Rob. 517; U. S. *v.* Bank, 11 Rob. 418; Martin *v.* Blanchin, 16 An. 237.

"The jurisdiction of the courts over the subject-matter of appointing receivers to corporations, and their power to make such appointments in proper cases, have been frequently recognized. Stark *v.* Burke, 5 La. An. 740; N. O. Gaslight Co. *v.* Bennett, 6 An. 456; Brown *v.* Union, 3 An. 182; Fallett *v.* Field, 30 An. 162.

"In the matter of the Louisiana Savings Bank, 35 La. An., p. 199 (A. D. 1883)."

This doctrine was reaffirmed in Raymond *v.* Palmer, *ib.* p. 277.

In conclusion, it is submitted that the five several assignments of error (brief of counsel for plaintiff in error, pp. 9–13) fail to present any Federal question which this court will review. And further, that the said several assignments of error present questions of local law or practice in respect of which the judgment of the Supreme Court of the State of Louisiana was final.

Respectfully submitted.

ALEXANDER PORTER MORSE,
Of Counsel for Defendants in Error.

WASHINGTON, D. C.,
January 14, 1899.